U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 05 800 62332 Office: NEBRASKA SERVICE CENTER Date: JAN 18 2007

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mary Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physical scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The director's decision is effectively based on the petitioner's failure to submit evidence relating to some of the regulatory criteria for aliens of exceptional ability.

On appeal, counsel attempts to address the director's bases of denial through the submission of a brief and additional evidence. Much of the evidence submitted relates to events after the petition was filed. As will be discussed below, however, the director erred in requiring evidence that the petitioner, an advanced degree professional, also meets the regulatory definition of exceptional. Significantly, such evidence would not have established eligibility for the waiver sought even if submitted. This error prevented the petitioner from filing a meaningful appeal. Thus, we will remand this matter for a decision applying the correct standard.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. from the University of Madras. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the

professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The director acknowledged the test set forth in the above precedent decision and concluded, rationally, that the petitioner works in an area of substantial intrinsic merit and that the proposed benefits of the petitioner's work would be national in scope. When considering the final element set forth in that decision, however, the director concluded that the record was not persuasive because it lacked evidence of awards showing a sustained pattern of achievement, high remuneration indicative of exceptional ability and professional memberships. These requirements do not appear in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215. Rather, high remuneration and professional memberships are

two regulatory criteria for aliens of exceptional ability. 8 C.F.R. §§ 204.5(k)(3)(ii)(D), (E). The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires evidence of recognition for achievements and significant contributions by peers, governmental entities or professional or business organizations. Some awards could serve to meet this criterion if indicative of a degree of expertise significantly above that ordinarily encountered in the field.[1] *See* 8 C.F.R. § 204.5(k)(2)(definition of "exceptional").

Thus, the director essentially denied the petition because the petitioner failed to demonstrate that he is an alien of exceptional ability. We acknowledge that the supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

This language, however, does not require that the alien qualify as an alien of exceptional ability as defined at 8 C.F.R. § 204.5(k)(3)(ii). Rather, the *benefit* of the alien's entry into the United States must exceed the benefit inherent in admitting aliens of exceptional ability. For example, the benefit for aliens of exceptional ability not seeking a national interest waiver is not necessarily national in scope for each alien. *See Matter of New York State Dep't of Transp.,* 22 I&N Dec. 215, 217, n.3. (Comm. 1998.)

Most significantly, the petitioner in this matter qualifies as a member of the professions holding an advanced degree. After the publication of final regulation at 8 C.F.R. § 204.5(k), Congress amended section 203(b)(2)(B) of the Act to extend the national interest waiver, originally interpreted by legacy Immigration and Naturalization Service (now Citizenship and Immigration Services) as limited to aliens of exceptional ability,[2] to advanced degree professionals. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232 § 302(a)(2)(D), 105 Stat. 1733, (Dec. 12, 1991). Thus, it was reversible error to hold that the petitioner, an advanced degree professional, must also demonstrate that he is an alien of exceptional ability to qualify for a waiver of the alien employment certification in the national interest.

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[1] Scholarships and other "awards" in recognition of academic achievements are not persuasive evidence for a national interest waiver of the job offer requirement. *See Matter of New York State Dep't of Transp.,* 22 I&N Dec. at 219, n.6.

[2] While we acknowledge that the regulation at 8 C.F.R. § 204.5(k) has not been amended to include members of the professions holding advanced degrees as eligible for the national interest waiver, the statute supercedes our regulation.

Furthermore, even if the petitioner had submitted the materials considered lacking by the director, they would only have established that the petitioner is an alien of exceptional ability, a classification that normally requires an alien employment certification. Thus, meeting the requirements for that classification would not have addressed the extra benefit sought by the petitioner in this matter, a waiver of the alien employment certification requirement. *See Matter of New York State Dep't of Transp.,* 22 I&N Dec. at 221.

Therefore, this matter will be remanded for consideration of the evidence submitted relating to the petitioner's individual achievements in the field. In evaluating the evidence, the director shall take into consideration that eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

In considering the evidence submitted previously and on appeal, the director shall take into account that the petitioner must establish eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, the director cannot consider any evidence of influence in the field after the date of filing. Moreover, the director may wish to take into account whether the letters establish the petitioner's influence beyond his immediate circle of colleagues and those who have collaborated with his coauthors. The source of the letters, the content of the letters and the number of citations *for each article* are relevant considerations.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.